

**RE DUNLOP ESTATES BHD.
DUNLOP ESTATES BHD. v.
ALL MALAYAN ESTATES STAFF UNION**

[F.C. (Suffian L.P., Wan Suleiman & Chang Min Tat F.JJ)
October 30, 1980 & January 30, 1981]

[Kuala Lumpur — Federal Court Civil Appeal
No. 115 of 1979]

Industrial Law — Appointment — Grading on recruitment — Hospital Assistant recruited as Grade I Hospital Assistant — Paid salary of Grade II Hospital Assistant — Finding of Industrial Court that appointment was as Grade I Hospital Assistant — Effect of — Entitlement to difference in pay from date of appointment — Time frame and non-time frame awards — Industrial Relations Act, 1967, s. 30(7).

Administrative Law — Application for certiorari to quash award of Industrial Court — Appointment — Finding that appointment was as Grade I Hospital Assistant — Effect of — Entitlement to difference in pay from date of appointment — Industrial Relations Act, 1967, s. 30(7).

This was an appeal from the decision of the High Court reported in [1980] 1 M.L.J. 243. The dispute before the Industrial Court related to the appointment of a Mr. Soon. The respondent Union claimed that he was appointed as Grade I Hospital Assistant but the appellants insisted that he was appointed as Grade II Hospital Assistant. The Industrial Court decided that Mr. Soon was appointed as a Grade I Hospital Assistant and ordered the appellants to pay the difference in his pay from the date of his recruitment, that is, October 1, 1970. An application was made to the High Court for the order to be quashed on the ground that the order of the Industrial Court could not be made retrospective earlier than six months from the date the dispute was referred to the court, that is, November 8, 1976. The learned Judge held that the six month's limitation imposed by statute was not applicable and he dismissed the application. The appellants appealed.

Held: (1) the finding of the Industrial Court was that Mr. Soon was appointed a Grade I Hospital Assistant from the date of his assumption of duty on October 1, 1970 and the court therefore ordered the appellants to pay the difference in pay as from October 1, 1970. There was no question of retrospectivity in the order;

(2) the award of the Industrial Court was one which arose from a finding of fact but even if it could be said that the award or the part of it in excess of six months was contrary to the Industrial Relations Act (which the Federal Court held it was not) this merely constituted an error of law on the face of the record which did not effect jurisdiction and the High Court could not quash the award.

Cases referred to:-

- (1) *Chartered Bank, Kuching v. Kuching Bank Employees Union* [1966] 2 M.L.J. xlv.
- (2) *South East Asia Firebricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1980] 2 M.L.J. 165.
- (3) *Anisminic v. Foreign Compensation Commission* [1969] 2 A.C. 147.

The following cases were also cited in argument: *Government of Malaysia v. Rosalind Oh Lee Pek Inn* [1973] 1 M.L.J. 222; *Malayawata Steel Bhd. v. Union of Malayawata Steel Workers* [1978] 1 M.L.J. 87.

FEDERAL COURT.

V.T. Nathan (Andrew T.C. Saw with him) for the appellants.

D.P. Xavier for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): The appellants had applied for an order of *certiorari* to remove to the High Court and to quash the award of the Industrial Court in Industrial Court Case No. 228 of 1976. They failed in their applica-

A tion and now appeal.

The dispute before the Industrial Court was over the claim of Mr. Soon, a Hospital Assistant who was first employed by the appellants in October 1970. The respondent Union, of which Soon was a member, maintains that the latter was recruited as a Grade I Hospital Assistant and had been performing the duties of a Hospital Assistant of that grade but was not paid the salary of that grade as provided in the 1971 agreement between the Malayan Agricultural Producers Association and the All Malayan Estates Staff Union. The appellants however insisted that Soon had been recruited as a Grade II Hospital Assistant.

C It is not disputed that Soon first brought up the question of grading with the appellants on April 27, 1974, and eventually the dispute was referred under section 26(2) of the Industrial Relations Act, 1967 to the Industrial Court on November 8, 1976. By its award, made on March 10, 1978, the court found on the evidence that Mr. Soon was in effect employed as a Grade I Hospital Assistant from the date of his recruitment viz. October 1, 1970, and ordered appellants to pay him the difference between what he should have been paid and what he actually received since October 1, 1970 in basic salary and allowances if any.

D Before the High Court the issue was narrowed down. The appellants accepted the order of the Industrial Court that Mr. Soon should be emplaced on Grade I and paid the salary of that grade, but argued that the order should not be made retrospective from October 1, 1970, by reason of section 30(7) of the Act. Though earlier dates were suggested, the learned judge rightly held that the date of reference by the Minister, November 8, 1976 is the date of "reference to court".

F The learned judge then proceeded to examine section 30(7) and in a well reasoned judgment held that section 30(7) does not apply in this case, and the six months limitation imposed by statute is also inapplicable.

He dismissed the application with costs.

G Azmi J.'s interpretation of section 30(7) is, submits counsel for the appellants, wrong. Learned counsel goes on to say that there is nothing uncertain or ambiguous in section 30(7), that its language is clear and manifests the intention of Parliament.

Section 30(7) reads as follows:

H "An award may specify the period during which it shall continue in force, and may be retrospective to such date as may be specified in the award:

Provided that the retrospective date of the award may not, except in the case of a decision of the court under section 33 or an order of the court under section 56(2)(c) or an award of the court for the reinstatement of a workman on a reference to it in respect of the dismissal of a workman, be earlier than six months from the date on which the dispute was referred to the court."

I The learned judge had, he complains, seen a lacuna in the proviso, referring to that part of his grounds of judgment wherein he noted that the draftsman of the Act had only made three exceptions to the proviso when it is clear that there are other situations, as in the present appeal, which if known to

the legislature would also have been exempted from the six months' limitation.

To support his argument that time is the essence of the scheme of the Act, Mr. Nathan indicated various sections of the Act which placed an emphasis on the time within which certain acts had to be done. For instance, under section 13(4), an employer who has been invited by a trade union of workmen to commence collective bargaining must reply notifying acceptance or otherwise within 14 days of receipt of the invitation, and if the employer accepts the parties should commence collective bargaining within thirty days thereafter; under section 14(2)(b) a collective agreement should specify the period it should continue in force; that section 16 specifies the time within which a signed copy of a collective agreement shall be deposited by the parties with the Registrar, and so on.

In short, the time-limit set in section 30(7) is according to his view in consonance with the general scheme of things.

The learned judge was also of the view that for the purpose of section 30(7) there should be a distinction between a "time frame" award and a "non-time frame" award. To cite that portion of his judgment:

"In a non-time-frame award involving orders like reinstatement or grading on first appointment — as in the present case — I do not think that the subsection should apply. To interpret otherwise, would, in my view, lead to absurdity and inconsistency which the legislature could never have intended."

As an example the learned judge considered the case of dismissal. If appellants' interpretation is correct, he said, a workman who is not a union member and who has been dismissed without just cause or excuse can be reinstated, on a successful representation by him under section 20, and because of the exception to the proviso to section 30(7), the order for reinstatement can be made retrospective from the date of his dismissal even though such date is more than six months from the date on which the dispute was referred to court. However a union member similarly dismissed and whose case is referred by the Minister under section 26, cannot have his order of reinstatement made retrospective more than six months from the date of reference by virtue of the proviso to that subsection.

This interpretation of section 30(7), if correct, says Mr. Nathan would mean that the court could order the rewriting of a contract of employment ages after it had been made.

We were then told that there would not be injustice in giving section 30(7) its literal interpretation. Mr. Soon had applied for the post of Grade I Hospital Assistant. (See page 17, affidavit of Duffield, Estates Director of the appellant estate). He was appointed on probation at a salary of \$350 p.m. and a qualification allowance of \$40 p.m. as from October 1, 1970. The collective agreement (at pages 121/133) between the Malayan Agricultural Producers Association and the All Malayan Estates Staff Union, 1971 was signed on April 3, 1971. The Industrial Court took cognisance of it on May 4, 1971, so that

A by section 17 it became a binding award.

This collective agreement, we are told, has three legal consequences.

Firstly claimant's right to be brought under its terms can at best be as from April 3, 1971 (the date it was signed).

B We note that Mr. Nathan is clearly in error on this point because the agreement came into effect on July 1, 1970, (see page 132 of Appeal Records), so that Mr. Soon's appointment and terms of service would be governed by it.

C Next, according to Mr. Nathan, the respondents could have brought their case within the proviso to section 30(7) by either having this question interpreted under section 33 by the court or on a complaint under section 56 that any term of the collective agreement has not been complied with.

Let us therefore consider the relevant subsections of the two sections mentioned.

D "33(1). If any question arises as to the interpretation of any award or collective agreement taken cognisance of by the court, the Minister may refer the question, or any party bound by the award or agreement may apply, to the court for a decision on the question.

E 56(1). Any complaint that any term of any award or of any collective agreement which has been taken cognisance of by the court has not been complied with may be lodged with the court in writing by any trade union or person bound by such award or agreement."

F In considering whether the Union could have exercised either of the two options, let us bear in mind that the issue before the Industrial Court simply is whether the appointment of Mr. Soon as Hospital Assistant was to Grade I as the Union contends, or to Grade II as the appellants say it is.

G Apart from a misreading by counsel on the effective date of the collective agreement, a contention which was never raised either before the Industrial Court, or in the High Court, and which was no longer pursued once his attention was drawn to the appropriate provision of the agreement, what remains is a finding to be made on this particular contract of service. There is no question of a dispute over interpretation of any term of the collective agreement so as to justify reference to the Industrial Court by either the Minister or any party under section 33(1), nor can it found a complaint which can properly be lodged under section 56(1) that any term of the collective agreement has not been complied with, for a complaint under this latter section can only arise where any term of the collective agreement has been ignored.

H Therefore any suggestion that respondents had two other alternatives to bring themselves within the proviso of section 30(7) and thereby circumvent the limitation to retrospectivity is untenable.

I The finding of the Industrial Court is that Mr. Soon was indeed appointed as a Grade I Hospital Assistant as from the date of his assumption of duty on October 1, 1970, and therefore ordered the appellant company to pay the claimant the total difference between what it should have paid Mr. Soon and what he had in fact received since October 1, 1970.

In the words of Mr. Xavier, the Industrial Court did not order the regrading or promoting of Mr. Soon but found as a fact that he was appointed a Grade I Hospital Assistant, but paid a Grade II salary.

With respect we would agree with Azmi J. that section 30(7) does not apply. In so holding, there would be no necessity to decide whether there is any lacuna in that subsection. His reasoning that this is a "non-time frame" award, and therefore that there is no question of retrospectivity in the order, would remove the need for such an exercise.

An analogous situation arose before the Industrial Arbitration Tribunal in *Chartered Bank, Kuching v. Kuching Bank Employees' Union*⁽¹⁾ (I.A.T. Case No. 4 of 1966). Para. 11 of the 2nd Schedule to the Essential (Trades Dispute in the Essential Services) Regulations, 1965 *inter alia* provides that an award may be retrospective to such a date not being earlier than six months from the date on which the dispute was first referred to the tribunal. The worker, in this case was dismissed on April 6, 1961, and the dispute was first referred to the tribunal on March 25, 1966. It was argued that any order for reinstatement would mean that the worker would be reinstated more than 6 months from the date on which the dispute was first referred to the tribunal and this would be *ultra vires* the regulations.

The tribunal held that trade disputes could develop out of acts and incidents which took place before the regulations were made and upon the tribunal dealing with the dispute, there does not appear to be any reason why the power of the tribunal to order reinstatement should be abrogated. The award (to reinstate) itself could not be said to be retrospective although the legal consequences which ordinarily flowed from the award and which was not of the tribunal's making, would give a retrospective benefit to the worker.

Similarly what the Industrial Court found in the present case after weighing all the evidence, is that Mr. Soon, from the date he commenced serving the appellant company, had been appointed a Grade I Hospital Assistant, as the Union contended he had been, and not Grade II, as the appellant company contended. The consequence of this finding, the entitlement to a certain sum of money which is the difference between what he had received from the appellants and what the court found he should have been paid, an entitlement which has already accrued, even if it does give a retrospective benefit, is not an award with retrospective effect.

Mr. Nathan also says that in making the award, the Industrial Court had acted beyond its jurisdiction and under the old section 29(3) of the Industrial Relations Act, 1967 (re-numbered section 32(3) as from 1.9.76 and repealed by Act A484 w.e.f. 30.5.80), applicable at the time of the award, a superior court can interfere by way of an order of *certiorari*. Mr. Xavier on the other hand maintains that the Industrial Court's finding was one of fact and therefore *certiorari* does not lie.

Both have referred us to the decision of the Privy

A Council in *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors.*⁽²⁾ There, their Lordships had, following the House of Lords decision in *Anisminic v. Foreign Compensation Commission*,⁽³⁾ held that where the words in a statute oust the power of the High Court to review the decision of an inferior tribunal by *certiorari*, they must be construed strictly, and will not have the effect of ousting that power unless the inferior tribunal has acted without jurisdiction, for example if it had done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. If the inferior tribunal had merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of natural justice then the ouster will be effective.

B "Trade dispute" is defined in section 2 of the Act and there can be no doubt that a trade dispute had arisen between the parties, which the Minister had properly referred to the Industrial Court under section 26(2) of the Act. We think that the court had properly applied its mind to the matter in dispute prior to making its award. It cannot therefore be said to be acting outside its jurisdiction.

C We are inclined to view its award as one which arose from a finding of fact, but even if it could be said that this award, or that part of it in excess of six months from the date of reference is contrary to section 30(7) of the Act, (which we think it is not) and therefore constitutes an error of law on the face of the record, the effect of the decision in *South East Asia Fire Bricks Sdn. Bhd.* is that section 29(3)(a) effectively ousts the jurisdiction of the High Court to quash the award.

D Therefore we would dismiss the appeal with costs.

E Appeal dismissed.

Solicitors: Ng Yook Woon, Andrew T.C. Saw & Zaharudin; D.P. Xavier & Co.

G V. SINNATHAMBOO v. MINISTER FOR LABOUR AND MANPOWER

[O.C.J. (Mohamed Azmi J.) August 5, 1978]

[Kuala Lumpur — Originating Motion No. 104 of 1976]

H *Administrative Law — Certiorari — Order of Director-General for Industrial Relations on behalf of Minister — Dismissal of workman — Application not made within one month of dismissal — Whether provisions for time limit mandatory — Industrial Relations Act, 1967, ss. 17A, 20(1) & 30(3).*

I *Industrial Law — Dismissal of workman — Application not made to Director-General within one month of dismissal — Application dismissed — Industrial Relations Act, 1967, ss. 17A, 20(1) & 30(3).*

The applicant had been dismissed on November 19, 1975. He did not make representations to the Director-General of Industrial Relations until January 13, 1976. The Director-General on behalf of the Minister made an order that his representation could not be entertained, as it was not made within one month of his dismissal. The applicant applied for an order of *certiorari* to quash the order of the Director-General acting on behalf of the Minister.